80-6242

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

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NIKOLA KAVAJA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

ANDREW B. SPIEGEL
77 West Washington Street
Suite 707
Chicago, Illinois 60602
312/782-8999
Counsel for Petitioner

February 21, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutional standards of due process, as enunciated in BRADY v. MARYLAND, 373 U.S. 83 (1963), and related decisions, were violated by the government's suppression of evidence material to the defense.
2. Whether the constitutional standards of due process, as enunciated in DAVIS v. ALASKA, 415 U.S. 308 (1973), and related decisions, were violated by the limitations placed on defense cross-examination of government witnesses.
3. Whether the constitutional standards of due process enunciated by this Court in IN RE WINSHIP, 397 U.S. 358 (1970), were violated by the conviction of Petitioner on the evidence presented and by the Court of Appeals order affirming that conviction.
4. Whether the imposition of consecutive ten (10) year sentences under Counts Eight and Nine of the indictment are violative of the rule of lenity enunciated by this Court in U.S. v. BASS, 404 U.S. 336 (1971) and related decisions.
5. Whether the imposition of consecutive ten-year sentences under Counts Eight and Nine of the indictment are violative of the constitutional prohibition against double jeopardy.
6. Whether the admission into evidence of materials seized in the search of the Kavaja residence, including published materials protected by the First Amendment, is violative of the constitutional standards of due process enunciated in BOYD v. UNITED STATES, 142 U.S. 450 (1892) and related decisions.
7. Whether the supervisory powers of this Court must be exercised to cure the constitutional defects in the proceedings below.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NIKOLA KAVAJA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petitioner NIKOLA KAVAJA (Kavaja) prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit, which affirmed his criminal conviction and denied his Motion to Supplement the Record and Motion to Remand.

The parties in the case below were RADOS STEVLICH, NIKOLA ZIVOVIC, NIKOLA KAVAJA, STOJILKO KAJEVIC, BOSKO RADONJIC, and ZIVOTIJE SAVIC.

KAVAJA INCORPORATES HEREIN BY REFERENCE THE PETITION FOR CERTIORARI OF RADOS STEVLICH AND NIKOLA ZIVOVIC FILED WITH THIS COURT ON FEBRUARY 21, 1981.

OPINIONS BELOW

The lower courts in this case rendered no formal written opinions. On October 21, 1980, the Court of Appeals affirmed Kavaja's conviction by unpublished order (Appendix A). Rehearing was denied on December 23, 1980 (Appendix B).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sections 1254(1), 1651 and 2106. Because of the diplomatic ramifications of this appeal, this Court's jurisdiction under Article III of the Constitution is also involved.

On October 21, 1980, the Court of Appeals affirmed Petitioner's conviction and denied his Motions to Remand and to Supplement the Record. On December 23, 1980, the Petition for Rehearing was denied.

This Petition for Certiorari was filed within sixty (60) days from the date upon which rehearing was denied.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 2, paragraph 2:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction.

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment V:

> No person shall be held to asnwer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Constitution of the United States, Amendment IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Constitution of the United States, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY AND RULES PROVISIONS INVOLVED

18 U.S.C. Section 371; Conspiracy to commit offence or to defraud United States:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do

any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Sections 844(d) and (i):

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

Rule 16(a)(1)(c) of the Rules of Criminal Procedure:

DOCUMENTS AND TANGIBLE OBJECTS. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

STATEMENT OF THE CASE

As stated in the Petition for Certiorari filed on behalf of RADOS STEVLICH (Stevlich) and NIKOLA ZIVOVIC (Zivovic), this case involves international terrorism.

Petitioner and his co-defendants were alleged to be Serbian terrorists. They were precluded from establishing that they are, in fact, the victims of the campaign of terrorism conducted in this country by agents of Communist Yugoslavia.

Kavaja was alleged to be the supplier of the explosive devices used in the conspiracy. It was also alleged that he was operating a "bomb factory" in the basement workshop of his residence in Paterson, New Jersey.

The Yugoslav Government had ample reason to "get" Kavaja. He had been a fighter pilot in the Yugoslav Air Force until the Communists discovered he was part of a clandestine military organization whose goal was the overthrow of the Communist dictatorship.

When their organization was uncovered, Kavaja and several fellow officers attempted to escape across the border into Austria. After a shoot-out with Yugoslav border guards, Kavaja was captured, put on trial for crimes against the State before a military tribunal, stripped of his citizenship, and sentenced to 18½ years in prison.

Kavaja began serving his sentence in December, 1953. He was kept in solitary confinement for long periods of time, was beaten and tortured.

In August, 1957, the Communists attempted to transfer Kavaja to a prison located on Goli Otok in the Adriatic Sea. Kavaja managed to escape, however, by overpowering a guard and jumping through a window of the moving train. This time he made it across the border into Austria.

While in Austria, Kavaja became active in the Serbian Orthodox Church. He remained anti-Communist, and joined an anti-Communist Serbian emigre organization -- The Serbian National Defense (SND).

In 1961, the President of SND in Paterson, New Jersey, sponsored Kavaja's immigration to the United States. Kavaja arrived in New York City on August 15, 1961.

The Yugoslavs were not the only ones out to "get" Kavaja. Documents obtained under the Freedom of Information Act (FOIA) from the Federal Bureau of Investigation (FBI) read like a comic version of a James Bond novel. Those documents indicate that the FBI attempted to recruit Kavaja as a double agent sometime in November, 1961. An FBI memorandum from SAC, Newark to Director, FBI, dated 11/28/61, indicated that Kavaja would:

> be approached on the basis that he is an alien admitted to the U.S. for the purpose of permanent residence who is expected to cooperate fully and truthfully with the FBI in carrying out its responsibilities for the internal security of this country. Care will be exercised to protect the original source in this matter.

(FBI doc. #00012, attached to Kavaja Motion to Supplement)

Kavaja refused to act as a double agent or as an informant for the FBI. From that point on, the FBI attempted to link Kavaja to subversive activities.

The FBI's investigation of Kavaja spread from the Newark office of origin, to New York, Chicago and other field offices. In their zeal to "get" Kavaja as a subversive, the FBI, itself, ignored the law.

On February 5, 1963, a Molotov cocktail was thrown at the Yugoslav Consulate in Chicago. The Department of Justice ruled that said incident was not a matter within federal jurisdiction.

That did not stop the FBI, however. A letter dated April 29, 1963, from J. Edgar Hoover to SAC, Chicago, stated that:

> Accordingly, you should not indicate in your investigation or in communications reporting results that instant investigations are being conducted for the purpose of identifying those responsible for the 2/5/63 attack.

(FBI doc. #00025-56, attached to Kavaja Motion to Supplement)

Kavaja's Motion to Supplement the Record and Motion to Remand allege that he has been a victim of COINTELPRO -- the FBI's secret war on political freedom in this country. Those Motions further allege the existence of material and, perhaps, exculpatory evidence, in the possession of the government.

Kavaja never did get his permanent residence status; he had been trying to get it since 1963.

On November 21, 1978, Kavaja was arrested in New York City along with STOJILKO KAJEVIC (Kajevic) and BOSKO RADONJIC (Radonjic). Kavaja was returning to Paterson from a "slava", a Serbian festival. His friend, Radonjic, was taking Kavaja to the bus station, but wanted to stop first at the parking garage he operated on West 59th Street. They were arrested at approximately 9:00 p.m.

Hours later, the FBI recovered thirteen sticks of dynamite from a paper bag found in one of the cars parked in the Radonjic garage. (Tr. 2080, 2118) Special Agent DANNY A. SCOTT (Scott) had seen

Radonjic remove a brown paper bag from the trunk of a Mercury registered to Radonjic's parking company.

Scott testified that Radonjic carried the bag in a palms-up fashion to the door of the garage and took it inside. (Tr. 2104-09) When the three came out of the garage, Radonjic did not have the bag with him. Kajevic had been, and was still, carrying a briefcase. A short while later, all three were arrested. (Tr. 2110-11) Kavaja had nothing in his possession. (Tr. 2145)

On the morning of November 22, 1978, the FBI raided Kavaja's house in Paterson. They were armed with a search warrant and intended to find:

> dynamite, a machinegun, a handgun, and a sawed-off shotgun, which are contraband, the means and instrumentalities, and evidence of the crimes of violation of 18 U.S.C. 371, 842(i), 924(c), & 970 and 26 U.S.C. 5861(d) and (d) and 5871, which constitute a clear and present danger to lives and property.

(R. 18-B, Ex. 3)

The FBI recovered no dynamite, no machinegun, no sawed-off shotgun.

They did, however, find assorted firecrackers, several handguns from World War II which were packed in cosmoline, a book in English entitled, POOR MAN'S JAMES BOND, some pieces of pipe, torn up pieces of paper retrieved from communal garbage (Tr. 2482, 2506), and some orange safety fuse. (Tr. 2506)

Many of the items seized were either suppressed or ruled irrelevant to the charges contained in the indictment. Among the items excluded was a photograph of Kavaja taken from a family album, which purportedly depicted Kavaja holding a submachinegun.

However, a number of items were allowed into evidence, over objection, including a piece of pipe threaded at both ends and painted red (Tr. 2490); firecrackers, matchheads and pyro-pops (Tr. 2493); a book in English entitled POOR MAN'S JAMES BOND by Curt Saxon (Tr. 2494); and daily job cards. (Tr. 2285)

The taped conversations obtained for the FBI by BOGOJE PANAJOTOVIC, (Bone) were also introduced into evidence. English transcripts of the Serbo-Croatian conversations were prepared by an interpreter who was a full-time employee of the FBI. Bone worked with her on that project, identifying the voices and setting the context.

Only two brief excerpts of the hundreds of hours of conversation contain Kavaja's direct words. They are susceptible to many different interpretations. The excerpts used at trial were taken out of context; entire conversations could not be translated or transcribed. To indicate this, the FBI used three dashes to indicate a gap; three dots a pause. (Tr. 1156)

Government Exhibit 205 is a transcript of a conversation between Bone and Kavaja in Chicago on June 20, 1978. Kavaja was in Chicago as the New York delegate to the annual SND meeting. SND is located at 3903 North Avenue, Chicago. (Tr. 1144)

Bone and Kavaja talked about a variety of subjects, including the discovery of four dynamite bombs in the attic of a house in Downers Grove, Illinois, belonging to ZIVOTIJE SAVIC (Savic). Savic pled guilty to the charges and took no part in the trial below. (Tr. 145-149)

Kavaja told Bone that one should never keep dynamite in one's house because it is so dangerous. He also said that he does not keep dynamite in his house. (Tr. 1150)

At one point, their discussion turned to the brutal murders of DRAGISA KASIKOVIC (Kasikovic) and his fiance's nine-year old daughter, IVANKA MILOSEVIC (Milosevic). A memorial service had been held for them on June 11, 1978. (Tr. 417)

Kasikovic and Kavaja were close personal friends. Kasikovic had written a book entitled Lieutenant KAVAJA, describing Nikola Kavaja's exploits before coming to America.

Bone then told Kavaja about Dragica, Ivanka's mother, who is so depressed, so lost, that she cannot even mourn. Kavaja, an emotional man, said that their murders will be avenged. He said he would like to go to the Yugoslav Embassy with a machinegun and kill everyone there, even President Carter, if he were there. (Tr. 1153-54)

Government Exhibit 206 is the transcript from July 1, 1978, again at the SND Congress. It was recorded in a restaurant across the street from SND headquarters. Exhibit 206 also has many gaps. Only two pages of it contain Kavaja's words. The exact language is:

ZIVOVIC: Well, O.K.--

KAVAJA: Let me tell you something... one thing... I told Rados--Kajevic, you know, I still haven't seen--

PANAJOTOVIC: Wait, wait, wait...Listen...wait--

ZIVOVIC: Listen--

KAVAJA: -- listen, listen. You told me yesterday. He said that I had 200 pieces, 200 pieces-- a trunk, he said Nikola has, he said, but this is only for me, nothing else...You're not going to receive even one -- -- -- He said: Who told you that there is some -- that, that and that...And -- from me, I said, I don't have it...buddy...I only have 13 pieces...

ZIVOVIC: -- -- what have you to say...

PANAJOTOVIC: Then you don't know about this other which I know about...

KAVAJA: Eh, you'll never be able to get the others from---

PANAJOTOVIC: And you still don't know where it came from, brother. Just now I see that you don't know everything...

PANAJOTOVIC: ...wait for me to tell you...I just want to ask you... Now we're all here and we can talk...who is this, this woman sitting here--?

STEVLICH: I think that she's an Indian women she ate lunch about an hour ago--I remember...

PANAJOTOVIC: Ah, no...no--

ZIVOVIC: -- I see that she keeps smiling when we talk...

PANAJOTOVIC: Yeah...

STEVLICH: Well, good --

PANAJOTOVIC: Should we talk -- huh?

ZIVOVIC: Who knows --

KAVAJA: Nikola, knock that you of your head- no one is following us.

(Tr. 1204-1206)

At the trial, Bone testified that when Kavaja referred to thirteen pieces, he meant of dynamite. (Tr. 1209) The trial recessed for the day with that last seed planted in the mind of the jury. (Tr. 1219)

There are other references to Kavaja on the tapes, but only those two have recorded his actual words, at least part of them. The other statements used as evidence against Kavaja were statements by alleged co-conspirators, none of whom testified at trial. (See English transcripts read into record: Ex. 200, Tr. 967-989; Ex. 201, Tr. 997-1009; Ex. 202, Tr. 1053-1062; Ex. 203, Tr. 1094-98; Ex. 204, Tr. 1128-1142; Ex. 207, Tr. 1231-1258; Ex. 208, Tr. 1313-1331).

Kavaja was charged with conspiracy under Count One of the indictment (18 U.S.C. 371); under Count Three, he was charged with making dynamite bombs, in violation of 26 U.S.C. 5861(f).

Counts Eight and Nine, the final two Counts Kavaja was charged under, stated:

> COUNT EIGHT: The SPECIAL NOVEMBER 1978 GRAND JURY further charges:
>
> From in or about June of 1978 and continuing until November 21, 1978, in the Northern District of Illinois, Eastern Division,
>
> STOJILKO KAJEVIC,
> NIKOLA KAVAJA,
> BOSKO RADONJIC,
> RADOS STEVLICH, and
> NIKOLA ZIVOVIC,
>
> defendants herein, did maliciously attempt to damage and destroy by means of explosives, a building and other real and personal property known as the Yugoslav Club, located at 5540 South Naragansett in Chicago, Illinois, which building and other real and personal property were then being used in interstate and foreign commerce and in an activity affecting interstate and foreign commerce.
>
> In violation of Title 18, United States Code, Section 844(i).

> COUNT NINE, relying on the same incident states:
>
> The SPECIAL NOVEMBER 1978 GRAND JURY further charges:
> On or about November 21, 1978, at Chicago, in the Northern District of Illinois, Eastern Division,
>
> STOJILKO KAJEVIC,
> NIKOLA KAVAJA,
> BOSKO RADONJIC,
> RADOS STEVLICH, and
> NIKOLA ZIVOVIC
>
> defendants herein, did attempt to transport and receive in interstate commerce an explosive with the knowledge and intent that it would be used to kill, injure and intimidate individuals and destroy a building known as the Yugoslav Club located at 5540 South Naragansett in Chicago, Illinois.
>
> In violation of Title 18, United States Code, Section 844 (d).

Defendants Savic and Radonjic pled guilty and took no part in the trial. The four dynamite bombs were recovered in the Downers Grove home of Savic. Thirteen sticks of dynamite were recovered from Radonjic's garage in New York City.

After a six-week jury trial, each of the remaining defendants was found guilty under each of the Counts in which they were charged. On June 22, 1979, the District Court sentenced Kavaja to consecutive ten-year prison terms on Counts Eight and Nine, for violations of

18 U.S.C. 844(d) and (i). After eighteen years, the FBI had finally gotten their man.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DUE PROCESS STANDARDS ENUNCIATED BY THIS COURT IN BRADY v. MARYLAND, 373 U.S. 83 (1963).

This reason is dealt with extensively in co-defendants Stevlich's and Zivovic's Petition for Certiorari which is incorporated herein by reference.

2. THE CONSTITUTIONAL STANDARDS OF DUE PROCESS ENUNCIATED IN DAVIS v. ALASKA, 415 U.S. 308 (1973) AND RELATED DECISIONS, WERE VIOLATED BY THE LIMITATIONS PLACED UPON DEFENSE CROSS-EXAMINATION OF GOVERNMENT WITNESSES.

This reason for granting the writ is also dealt with in the Petition filed on behalf of Stevlich and Zivovic, incorporated herein by reference.

3. THE CONSTITUTIONAL STANDARDS OF DUE PROCESS ENUNCIATED BY THIS COURT IN IN RE WINSHIP, 397 U.S. 358 (1970) AND RELATED DECISIONS WERE VIOLATED BY THE CONVICTION OF PETITIONER ON THE EVIDENCE PRESENTED.

In 1970, this Court declared that the due process clause:

> protects the accused against conviction except upon proof beyond a reasonable doubt of EVERY FACT NECESSARY to constitute the crime with which he is charged.
>
> (emphasis supplied)

IN RE WINSHIP, 397 U.S. 358, 364 (1970)

The Seventh Circuit, in affirming Kavaja's conviction, stated that there was ample evidence of Kavaja's participation in the conspiracy alleged, his admissions to Bone, his co-conspirators' statements, as well as the evidence seized in the two searches and the testimony of surveillance agents.

That decision misapprehended the evidence in several respects. First, Kavaja made no admissions to Bone. He told Bone he did not keep dynamite in his house. Government Exhibit 205, June 30, 1978. The FBI search of his residence confirmed that statement; no dynamite was found.

Kavaja did tell Bone that he had thirteen pieces, but thirteen pieces of what? According to Bone, he meant dynamite. Bone's credibility and motivation for testifying as he did relate directly to the government's suppression of material evidence.

Both the Yugoslav Intelligence Service (YIS) and the FBI had been after Kavaja for years. If Bone was a YIS agent as theorized by the defense, then his testimony is of dubious value.

There are many examples in the record of Bone's inability to tell the truth. One example is Bone's denial of ever meeting or knowing a man named BRANKO LAKIC (Lakic). (Tr. 1924-25, 1978)

Lakic was Vice-Consul in the Yugoslav Consulate in Chicago. Testimony was adduced that he was also a high-level agent of the YIS charged with responsibility for the Midwestern states. (Tr. 2840-42)

Although Bone testified he had never met Lakic, other witnesses testified to numerous meetings between the two. (Tr. 1736, 2862, 2864, 2907, 2911, 2916-17)

Did Kavaja mean dynamite? Like the "bees" in U.S. v. FIORITO, 499 F.2d 106 (7th Cir., 1974), Kavaja could have meant anything by that.

In fact, on Government Exhibit 204, at page 24, Bone told Zivovic that Radonjic got the dynamite from Ohio. Thirteen pieces of dynamite were found in the search of Radonjic's garage in New York; he pled guilty to the charges.

The next deficiency relates to the elements of conspiracy and whether they were proved by independent evidence against Kavaja.

There was no independent evidence to establish that Kavaja was part of the conspiracy. The surveillance agents saw Kavaja with his friends, nothing more. Mere presence at the scene of a crime or association with conspirators or even knowledge that something illegal is going on are not by themselves sufficient to support a conspiracy conviction. U.S. v. DALZOTTO, 603 F.2d 642 (7th Cir., 1979).

Kavaja's knowledge of the purpose of the conspiracy must be established by clear and unequivocal evidence. U.S. v. FELLABAUM, 408 F.2d 200 (7th Cir., 1978). Only then can it be inferred from the acts, circumstances and conduct of the parties. The panel order and the jury's verdict put the cart before the horse, inferring from the circumstances that Kavaja was part of the conspiracy. Without establishing knowledge and intent on Kavaja's part by clear and convincing evidence, there can be no showing of agreement. INGRAM v. U.S., 360 U.S. 672 (1959).

Charges of conspiracy are not to be made out by piling inference upon inference, thereby fashioning a dragnet to draw in all substantive crimes. DIRECT SALES CO. v. U.S., 319 U.S. 703 (1943), p. 711. Yet the government inferred Kavaja's agreement, inferred what he meant by pieces, inferred that he was able to read the book Poor Man's James Bond, inferred that the safety fuse and diagrams found in Kavaja's house were Kavaja's rather than belonging to co-defendant Kajevic, who had been staying at Kavaja's.

The evidence seized in the New York search was linked to Kavaja only through Bone's testimony. As stated above, Bone also testified that Radonjic got the dynamite from Ohio, and Radonjic pled guilty to the charges.

The government simply failed to prove beyond a reasonable doubt that Kavaja was a member of the conspiracy charged. The panel order misapprehended the large volume of evidence. There was very little evidence as to Kavaja. The substantive crimes alleged against him were caught up in the conspiracy Count, the precise danger mentioned in DIRECT SALES, supra.

No direct evidence of Kavaja's agreement was offered by the Government. It attempted to prove this element through incriminating extra-judicial statements of alleged co-conspirators. The statements of Kavaja's co-conspirators are inadmissible as to Kavaja without independent evidence establishing Kavaja's participation in the conspiracy. GLASSER v. U.S., 315 U.S. 60, 74-75 (1942); U.S. v. DALZOTTO, 603 F.2d 642 (7th Cir., 1979).

The admission of those statements in this multi-defendant conspiracy trial violated Kavaja's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. BRUTON v. U.S., 391 U.S. 123 (1968).

Kavaja's conviction on Count Three was based solely upon the statement of one of the alleged conspirators that Kavaja supplied the fuse, that Kavaja was good because he supplied them with everything they needed. That statement, however, was inadmissible absent a showing by clear, convincing and independent evidence that Kavaja was part of the conspiracy. There was no such evidence.

Furthermore, the Seventh Circuit has indicated that only slight evidence is needed to link a defendant to the conspiracy alleged. DALZOTTO, supra.

The slight evidence standard of the Seventh Circuit is in direct conflict with the substantial evidence standard enunciated by this Court in GLASSER, supra, and the Fifth Circuit's recent renunciation of the slight evidence standard in U.S. v. MALATESTA, 590 F.2d 1379 (5th Cir., 1979).

The District Court has emphasized the paramount importance of the tapes in establishing the guilt of the Defendants. Government Exhibit 200, recorded June 10, 1978, was a conversation between Bone and Kajevic. They had been discussing real estate and making bombs. Bone asked Kajevic who knows how to make bombs:

> BONE: I know who, Kavaja... He knows how to make them well... But the last one Branko...
>
> KAJEVIC: BUT HE DOESN'T BELIEVE IN THAT. Branko knows.
>
> (emphasis supplied)

Is Kajevic telling Bone that Kavaja doesn't believe in making bombs? Is the "Branko" referred to Branko Lakic of the YIS? Is this proof beyond a reasonable doubt?

Conspiracy is a nebulous crime. Its use in a trial such as this with political, diplomatic and international overtones must be closely watched.

In GRUNEWALD v. UNITED STATES, 353 U.S. 391, 404 (1957) a unanimous opinion of this Court once again pointed to the dangers of the conspiracy statute. Here, as there, no direct evidence established agreement on the part of Kavaja. In its opinion, the Court stated:

> There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.
>
> Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecution...

In 1934, Clarence Darrow stated:

> If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States.

C. Darrow, The Story of My Life, 64 (1934).

Courts have repeatedly warned of the dangers inherent in the "wide-sweeping nets of conspiracy prosecutions".

When his case is viewed on its own merits, it is clear that Kavaja was a victim of this danger. There was insufficient evidence to sustain the jury's verdict; the due process standards enunciated by this Court were violated by Kavaja's conviction.

4. THE IMPOSITION OF CONSECUTIVE TEN-YEAR SENTENCES UNDER COUNTS EIGHT AND NINE OF THE INDICTMENT VIOLATE THE RULE OF LENITY ENUNCIATED BY THIS COURT IN U.S. v. BASS, 404 U.S. 336 (1971) AND RELATED DECISIONS.

Kavaja was sentenced to consecutive TEN (10) YEAR terms for violation of 18 U.S.C. 844(i) and 844 (d) as alleged in Counts Eight and Nine of the indictment. These sections were enacted as part of the Organized Crime Control Act, P.L. 91-452. Both the statute itself and its legislative history are silent as to whether Congress intended subsections (d) and (i) of 18 U.S.C. 844 to be given a cumulative effect, as was done in the Court below. The established rule of construction is that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity". UNITED STATES v. BASS, 404 U.S. 336, 347 (1971). The consecutive TEN (10) YEAR sentences imposed on Kavaja violate this rule.

It is clear from the legislative history that sections 844(d) and (i) are addressed to the same concern and designed to combat the same problem: the protection of interstate and foreign commerce against interference and interruption by reducing the hazards to persons and property arising from explosives misuse and unsafe or insecure storage. That was one of the primary reasons for the enactment of Title XI, P.L. 91-452. 1970 U.S. CODE CONGRESSIONAL and ADMINISTRATIVE NEWS, 4013.

Title XI was in reaction to the widespread violence in this country in 1969-1970. The hearing record disclosed that between January 1, 1969 and April 15, 1970, law enforcement officials reported a total of 4,330 bombings, 1,475 attempted bombings, and 35, 129 threatened bombings. Id., at 4013. In that same period, such bombing outrages were responsible for the deaths of forty persons and approximately $22 million in property damage.

Title XI was designed to meet a national concern that existing federal and state sanctions and prohibitions over the use, possession and transportation of explosives were inadequate. It combined the regulatory approach to the distribution and storage of explosives with strengthened and expanded criminal prohibitions that apply to the intentional misuse of explosives.

It is also clear from the legislative history that section 844 was meant to set the penalties for violation of the regulatory provisions of the chapter and to create certain offenses pertaining to the unlawful use of explosives. Id., at 4045-4047.

What is not clear is whether Congress intended to subject a defendant to multiple penalties for the single criminal transaction in which he engaged. The fact that two distinct offenses were enacted to combat the same problem is only the beginning of the analysis. SIMPSON v. UNITED STATES, 435 U.S. 6, 10 (1978).

In undertaking this analysis, the established practice is to avoid constitutional decisions where possible. SIMPSON, 435 U.S. at 12. Therefore, prior to determining whether cumulative punishment under 18 U.S.C. 844(d) and (i) is constitutionally permissible, it is necessary to attempt to determine whether Congress intended to subject Kavaja to cumulative penalties for the single criminal transaction charged in this case, the attempt to blow up the Yugoslav Club. JEFFERS v. UNITED STATES, 432 U.S. 137, 155 (1977).

There is no discussion in the legislative history as to what Congress intended in the interaction between 844(d) and (i). These provisions were lost amongst the numerous other titles and sections enacted in the Organized Crime Control Act. The only aspect of the penalties enacted with section 844 that received comment related to the death penalty provisions of paragraphs (d), (f) and (i). (See comments of Hon. Robert W. Kastenmeir and Hon. Don Edwards at 4070-73; Mr. David W. Dennis of Indiana, at 4075-76)

The legislative history here does not erase the doubt as to the congressional intent. This Court has steadfastly insisted that doubt will be resolved against turning a single transaction into multiple offenses. SIMPSON, 435 U.S. at 15; BELL v. U.S., 349 U.S. 81, 84 (1955).

In LADNER v. UNITED STATES, 358 U.S. 169 (1958), the Court stated that:

> This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such as interpretation can be based on no more than a guess as to what Congress intended.
>
> 358 U.S., at 178

When the meaning of a criminal statute is ambiguous, the policy of lenity requires that the less harsh of two possible meanings be adopted. LADNER, supra.

The decision below conflicts with this rule. It construed the ambiguity in 18 U.S.C. 844(d) and (i) in favor of the harsher meaning.

5. THE IMPOSITION OF CONSECUTIVE TEN-YEAR SENTENCES UNDER COUNTS EIGHT AND NINE VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

Beyond the question of statutory construction of sections 844(d) and (i), is the constitutional analysis referred to in SIMPSON of whether cumulative punishments for the two offenses are constitutionally permissible. It is submitted that the cumulative punishments imposed on Kavaja violated his Fifth Amendment right to be free from double jeopardy.

The Fifth Amendment to the United States Constitution states in part that:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .

The question presented for this Court's review is whether the consecutive TEN (10) YEAR sentences imposed on Kavaja in the trial court under sections 844(d) and (i) violate this constitutional protection.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. BLOCKBURGER v. UNITED STATES, 284 U.S. 296, 304 (1932). The Double Jeopardy Clause "protects against multiple punishments for the same offense", NORTH CAROLINA v. PEARCE, 395 U.S. 711, 717 (1969).

There is no dispute that Kavaja was a resident of Paterson, New Jersey. He was convicted under 18 U.S.C. 844(i) of attempting to destroy by means of explosives, a building and other real property known as the Yugoslav Club, located at 5540 South Naragansett in

Chicago, Illinois (Count Eight; he was also convicted of attempting to transport and receive in interstate commerce the explosives which would be used to destroy that building (Count Nine). Only one attempt was alleged.

The government did not allege, nor did it attempt to prove, that the dynamite to be used to blow up the Yugoslav Club in Chicago, was, itself, in Chicago. In fact, it was alleged that the dynamite to be used in this criminal transaction was to be transported and received in interstate commerce (Count Nine).

Cases in which the government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy, which requires an evaluation of the stautes in light of the BLOCKBURGER test.

For the government to establish the case it alleged against Kavaja, they had to establish the same facts; namely, that both Kavaja and the dynamite would travel in interstate commerce to blow up the building located in Chicago.

BROWN v. OHIO, 432 U.S. 161 (1977), reiterated the test to be applied to determine whether the Double Jeopardy Clause applies or not. That is whether each statutory provision requires proof of a fact which the other does not. 432 U.S. at 166.

As stated in BROWN, it has long been understood that separate statutory crimes do not have to be identical, whether in constituent elements or in actual proof, in order to be considered the same within the meaning of the Double Jeopardy Clause. 1 J. Bishop, NEW CRIMINAL LAW, sec. 1051 (8th ed. 1892); Comment, "Twice in Jeopardy", 75 Yale L.J. 262, 268-269 (1965), as cited in BROWN, 432 U.S. at 164.

The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. 432 U.S. at 169. Where consecutive sentences are imposed at a single criminal trial, the constitutional guarantee assures that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. GORE v. UNITED STATES, 357 U.S. 386 (1958); BELL v. UNITED STATES, 349 U.S. 81 (1955); EX PARTE LANGE, 18 Wall. 163 (1874).

While two separate offenses are set forth in 18 U.S.C. 844(d) and (i), that does not mean that Congress intended consecutive sentences where, as here, both offenses occurred as part of a single criminal transaction.

This Court recently held that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless EACH offense requires proof of a fact which the other does not. U.S. v. WHELAN, 48 U.S.L.W. 4406, 4408 (1980).

The prohibition in the Constitution against placing an accused twice in jeopardy "for the same offence", is directed at the actual "offence" with which he is charged, and not only at the violated statutes. The Constitution does not permit convictions for the "same offence" if they are charged under different statutes, even though violations of the two statutes would normally not constitute double jeopardy. U.S. v. SAMPOL, decided 9/15/80, C.A.D.C. p. 54.

These principles were applied by the Seventh Circuit in UNITED STATES v. CHANEY, 559 F.2d 1094 (7th Cir., 1977) construing 18 U.S.C. 844(d), (1) and (i). There, as here, one basic incident was involved; there, as here, the explosive in each Count referred to a single explosive; there, as here, the evidence to prove the one charge would prove the other charge.

In this case, as in CHANEY, Counts Eight and Nine constitute the same offense within the meaning of the Double Jeopardy Clause. In this case, the Seventh Circuit found no double jeopardy issue. That decision is in conflict with the authorities cited above.

6. THE ADMISSION INTO EVIDENCE OF MATERIALS SEIZED IN THE SEARCH OF KAVAJA'S RESIDENCE, INCLUDING FIRST AMENDMENT MATERIALS, VIOLATED THE DUE PROCESS STANDARDS ENUNCIATED BY THIS COURT IN BOYD v. UNITED STATES, 142 U.S. 450 (1892) AND RELATED DECISIONS.

It is well settled that evidence of other criminal acts allegedly committed by an accused but for which he has not been charged, does not constitute proof that the accused committed the offense with which he has been charged. It is, therefore, inadmissible. BOYD v. UNITED STATES, 142 U.S. 450 (1892).

The Federal Rules of Evidence authorize the admission of evidence concerning other crimes, wrongs or acts of a person for such purposes as proof of motive or plan. Such evidence is inadmissible, however,

to prove the character of a person in order to show that the person acted in conformity therewith. U.S. v. SAMPOL, supra, at p. 64; Fed. R. Evid. 404(b).

In this case, that is precisely what the prosecution did. Over defense objections, a piece of pipe threaded at both ends and painted red, firecrackers, the book Poor Man's James Bond, and other items were admitted into evidence to establish Kavaja's guilt.

The indictment did not charge any of the defendants with making pipe bombs, but the piece of pipe was used as evidence of the "fact" that Kavaja was making pipe bombs.

Special Agent GILMAN of the FBI's Newark Office was questioned regarding the pipes, which Kavaja had used to build a picnic table and grape arbor in the back yard and which had been used as structural support in Kavaja's house.

On cross-examination by Kavaja's trial counsel, the following exchange took place:

Q: Did you see any beams which held up the roof?

A: You are not talking about the floor joists?

Q: No, I am speaking about the roof joists.

A: The beams?

Q: The beams. Did you see them?

A: In certain areas, yes.

Q: Did you notice the use of pipe, such as this, in conjunction with the joists?

A: No, I did not.

Q: You didn't notice them?

A: Didn't notice any pipe in the roof beams at all.

Q: None whatsoever?

A: None whatsoever that I noticed.

Q: Did you see an arbor?

A: No, I did not.

Q: Did you notice a picnic table made out of pipe in the back yard?

A: No, I did not.

Q: Did you notice the seating arrangement made out of pipe in the back yard?

A: No. Sorry.

Q: You were in the basement, were you not?

A: Yes, we were.

Q: In the basement did you notice pipes, either in the ceiling or in the floor?

A: Only in the receptacle which I referred to earlier.

Q: I am sorry?

A: Only in the receptacle I referred to earlier.

Q: Nowhere else did you see any pipes?

A: Nowhere else did I see any pipes.

THE COURT: Are you talking about loose pipes, or pipes used as part of the plumbing?

MR. BRASHICH: Pipes which are part of the plumbing.

BY MR. BRASHICH:

Q: Did you notice anything?

A: Not in the workshop room. I didn't notice any in the workshop room, if that is the question you are asking.

Q: You didn't notice any pipes in the workshop room?

A: No.

(Tr. 2514-15)

Was this FBI agent merely unobservant, or did he have a motive for testifying falsely against Kavaja? Would an FBI agent deliberately lie under oath?

In U.S. v. CORTINA, Appeal No. 79-2226, Seventh Circuit Court of Appeals, (decided 9/11/80), the Court of Appeals held that it would not allow or condone reckless or deliberate misrepresentations to be made to magistrates.

In that case, Special Agent WILLIAM I. BROWN of the FBI was confronted with numerous inconsistencies in an affidavit he prepared in support of a search warrant.

His testimony was evasive and equivocal. He said that he could not recall, was not sure, or could not remember in response to almost every question put to him. His testimony prompted the Court to remark:

> I can tell you one thing: that if he were still living, J. Edgar Hoover would be rolling over in his mausoleum if he heard that man in this courtroom.

What was the point of using the book, POOR MAN'S JAMES BOND, as evidence? On oral argument before the Seventh Circuit, the government conceded that there was no showing in the record that Kavaja could or could not speak English.

There was no showing that Kavaja had sufficient understanding of the English language to read or understand that book, let alone construct explosive devices from it. It was used by the prosecution to bring before the jury its hearsay contents of how to build bombs, match bombs, pipe bombs.

The prejudicial effect of that book far outweighed its probative value. Yet, it was an integral part of the case against Kavaja.

In its closing arguments, the government referred directly to these items. In recalling for the jury what had been discovered in Kavaja's residence, the government stated:

> We found a barrelful of pipes of the kind that are usually used for pipe bombs, and firecrackers containing gunpowder, which the book POOR MAN'S JAMES BOND recommends for obtaining gunpowder for bombs.
>
> (Tr. 3147)

Does a man who operates a bomb factory and has access to dynamite have to resort to extracting gunpowder from firecrackers? Is this the kind of evidence required to establish guilt beyond a reasonable doubt?

The prosecution's pipe bomb theory had no relevance to the case and depended entirely upon the book which it never established Kavaja had read or was even able to read.

Similarly, the job cards admitted into evidence were of doubtful probative value. They were retrieved from garbage cans outside the Kavaja residence. The testimony regarding the writings on them was highly speculative and it never established whose writing was on the cards. They were certainly never linked to Kavaja.

The government admitted that it had the least amount of evidence against Kavaja (Tr. 778). The bulk of the evidence it did have should not have been admitted.

The due process clause of the Fifth Amendment was violated by the admission of that material into evidence against Kavaja.

6. THIS COURT MUST EXERCISE ITS SUPERVISORY CONTROL TO CORRECT THE CONSTITUTIONAL DEFICIENCIES IN THE LOWER COURTS' PROCEEDINGS.

This reason is discussed at length in the Petition of Stevlich and Zivovic (p. 41-52) which Kavaja adopts in support of his position.

Clearly, Kavaja has been a target of both the YIS and the FBI for many years. Kavaja endured years of harassment, but is now faced with

a twenty-year prison term as a result of a trial in which he was not allowed to prove his defense theories, not allowed to effectively cross-examine either the star witness or the FBI interpreter, not allowed access to evidence material to his defense, and not allowed to testify, although he fully expected to do so.

This Court must exercise its supervisory authority to correct these constitutional abuses.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and orders of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANDREW B. SPIEGEL
77 West Washington Street
Suite 707
Chicago, Illinois 60602
312/782-8999
Counsel for Petitioner

February 21, 1981

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(Argued May 8, 1980)

OCTOBER 21, 1980.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. PHILIP NICHOLS, JR., Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Nos: 79-1686, 79-1700, vs.
79-1707, 79-1737
STOJILKO KAJEVIC, NIKOLA KAVAJA, RADOS STEVLIC, and NIKOLA ZIVOVIC,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-858
HUBERT L. WILL, Judge.

ORDER

In a nine count indictment these four defendants were charged with a variety of offenses relating to the manufacture, transportation, and use of explosive devices. After a five week trial on eight of the counts (count five was dismissed before trial), each defendant was found guilty of the charges against him and each was sentenced to a term of imprisonment. We have considered the arguments raised by the defendants in their appeal and find no error which would require us to set aside the convictions. We have also considered, and deny, a motion to remand filed by defendant Kavaja and taken with appeal on the merits. Finally we rule on several motions filed since the date of oral argument.

SUPPRESSION ISSUES

There were two searches which were conducted at about the time of the defendants' arrests. One took place in New York City at a public parking garage leased and operated by Bosko Radonjic

* The Honorable Philip Nichols, Jr., Judge of the United States Court of Claims, is sitting by designation.

(a co-defendant who entered a guilty plea before trial), and the other in Paterson, New Jersey at the house of defendant Kavaja. The defendants filed motions to suppress the evidence seized during both searches which, after an evidentiary hearing, were denied by the district court.

The challenge to the search of the parking garage goes to the sufficiency of the evidence before the magistrate who issued the warrant. The warrant application was based on an affidavit reciting inter alia that the defendants had admitted to an informant their participation in past bombings and their plans for one in the immediate future. The defendants allege that the affidavit did not meet the standards of Aguilar v. Texas, 378 U.S. 108 for establishing the reliability of the confidential informant and therefore was an insufficient basis for the issuance of the warrant. The government responds initially by asserting that none of the defendants who are now challenging the search have any standing to do so and, that in any event, the affidavit contained sufficient corroborating evidence of the informant's reliability to support the magistrate's determination of probable cause.

The district court judge expressed his doubts about whether defendants other than Radonjic had standing to challenge the garage search but nonetheless proceeded to decide the question on its merits, concluding that no Aguilar problem was presented by the affidavit. Although we might well be inclined to agree with the district court were we to reach the merits of the defendants' argument, our conviction that the defendants are not in a position to challenge the legality of the garage search makes it unnecessary for us to reach the issue.

The Supreme Court, in a recent series of opinions, has stressed that only one who has an "expectation of privacy in the area searched" has "standing" to challenge a search of that area. United States v. Salvucci, U.S. , 48 U.S.L.W. 4881, 4883 (June 25, 1980); United States v. Payner, U.S. , 48 U.S.L.W. 4829 (June 23, 1980); Rakas v. Illinois, 439 U.S. 128, 134 (1978). In the district court one of the defendants challenging the search was the lessee of the parking garage. The defendants before us, however, are not in his position. Kavaja attempts to argue that because he was let into the garage late at night by Radonjic it can be inferred that he, as well as Radonjic, had an expectation of privacy in the garage. That argument is little more, however, than the "legitimately on the premises" argument which was decisively rejected by the Supreme Court in Rakas v. Illinois, 439, U.S. 128, 142-148. In the court below, and in their briefs to us, the defendants placed their primary reliance on the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), asserting that since they were charged with "possessory crimes" in connection with the dynamite found in the garage, they were automatically entitled to challenge the search which uncovered the dynamite. Since oral

argument in this case, however, the Supreme Court has explicitly overruled Jones, holding that "[w]e simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." United States v. Salvucci, U.S. , 48 U.S.L.W. 4881, 4883 (June 25, 1980). The defendants, therefore, can no longer rely on Jones to support their challenge to the search of the parking garage. Absent that boost from Jones, the defendants are plainly not in a position to assert that probative evidence should have been suppressed. We agree with the government that the defendants do not have standing to challenge the garage search and therefore decline to reach the question of whether the affidavit supporting the warrant was inadequate.

The defendants do not challenge the warrant which authorized the search of the Kavaja residence in New Jersey. Instead they sought the suppression of evidence obtained during the search on the grounds that either the evidence was not relevant or it was more prejudicial than it was probative and thus should have been excluded. The trial judge did exclude much of the evidence but other evidence, including firecrackers, painted pipes, and a book entitled Poor Man's James Bond, was admitted. We agree with the district court that the evidence was relevant and hold that there was no abuse of discretion in its admission. We specifically hold that the admission of the book, which contained directions on how to make explosive devices using items such as those seized, did not infringe the defendants' First Amendment rights. This is not a case in which "the ideas of an author of a book [are] attributed to the reader of the book and then used against him to prove disposition to commit a crime, motive to undertake criminal action, or proof that he did the acts charged." United States v. Giese, 597 F.2d 1170, 1209 (9th Cir. 1979).

OTHER EVIDENTIARY ISSUES

The defendants principal line of defense at trial was an attack on the credibility of the chief government witness, Bogoje Panajotovic. Like the defendants, Panajotovic had been a member of "SOPO" (Freedom for the Serbian Fatherland), an organization of Serbian nationals opposed to the communist government of Yugoslavia. Panajotovic's testimony against the defendants was an important, and perhaps in some cases, absolutely critical part of the government's case in chief. The thrust of the defendants' attack on the Panajotovic's credibility was that he was an agent of the Yugoslav secret police, which, with or without the knowing cooperation of the Federal Bureau of Investigation, was engaged in an effort to silence SOPO's opposition to the Tito regime.

On appeal the defendants allege that they were prevented from fully exploring and proving this defense before the jury. They question first whether there was good-faith compliance with a subpoena issued to various government agencies for information about

their clients and Panajotovic. The district court judge reviewed five boxes of the subpoenaed materials in camera and concluded that there was nothing in those materials that in any way lent support to the defense theory that Panajotovic was an agent of the Yugoslav government. Apart from Brady material which was separately provided to the defendants, the district court judge denied the defense access to the material, holding it was not relevant to the case. We have done the same and agree. Our review of those materials also convinces us that there is no need to remand the case to the district court for further consideration of the question of good-faith compliance. 1/ We therefore deny the motion for remand filed by defendant Kavaja.

The defendants also assert that the trial judge improperly limited their attempt to explain their theory about Panajotovic to the jury, pointing to statements by the trial judge that events which may have taken place in Yugoslavia were irrelevant and at one point, to a statement by the judge which may have suggested to the jury that Panajotovic's motivation for testifying was irrelevant.

We have reviewed the transcripts and are convinced that the defendants' theory about the reasons for Panajotovic's cooperation was fully before the jury. Not only was Panajotovic cross-examined about his relationship to Yugoslav officials in this country and about whether he had plans to return to Yugoslavia, but the defendants also presented witnesses who testified in support of the defense theory. The remarks by the trial judge which are cited in the appellants' briefs were generally proper responses to either argumentative opening statements or to inappropriate and inflamatory questioning by defense counsel. 2/

The question of Panajotovic's motivation for testifying against the defendants was a particularly sensitive one. On one hand, the defense wished to attack Panajotovic's credibility by suggesting that he was testifying as an agent of the Yugoslav Police. On the other hand, however, the defendants wanted to avoid any reference to an earlier attempted bombing in Canada which had resulted in the deaths of three people. Since Panajotovic's stated reason for cooperating

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1/ We have also found no support at all in materials we have recently examined in camera, produced by the government in response to an order we entered May 20, 1980 in connection with the motion to remand.

2/ For example, the judge sustained an objection by the government when defense counsel asked Panajotovic on cross-examination whether he wouldn't now be welcome in Yugoslavia in light of the service he was doing (by testifying against the defendants) for the Yugoslav government.

with the FBI was that the Canadian deaths had made him aware of the dangers of bombing as a form of political expression, it was difficult to make the first argument while still avoiding any reference to the second event. As it turned out, there were two brief and somewhat indirect references to the Canadian deaths in Panajotovic's direct testimony. One was ordered stricken by the trial judge and after the second the judge suggested that the prosecutor pursue a different line of questioning. Both references were fleeting and neither was the focus of any further questioning or argument by the prosecutor. The evidence was relevant to the issues at trial and even if its prejudicial effect outweighed its probative value, that prejudice became insignificant in light of the brevity of the testimony, the lack of attention it received, the trial court's curative instruction, and the context (a lengthy trial on multiple bomb-related counts) in which it arose. If there was any error in the court's handling of the situation it was harmless. 3/

Defendant Kavaja alleges that the evidence was insufficient to sustain his convictions on counts one, three, eight, and nine of the indictment. On review of the transcript, we conclude that there was ample evidence of Kavaja's participation in the conspiracy charged in count one. Kavaja's own admissions to the informant, as well as the statements of his co-conspirators about his co-conspirators about his role in the events charged in the other counts, were sufficient (along with the evidence obtained during the searches and the testimony of surveillance agents) to support his convictions on all counts.

KAVAJA'S MOTION FOR SEVERANCE

Late in the trial Kavaja made a motion for severance. He did not present to the trial court, or to us, any particular claims of prejudice (other than those inherent in any multi-defendant conspiracy trial) which would suggest that he could not or did not receive a fair trial. We find no abuse of discretion by the trial court in denying the motion.

CONSECUTIVE SENTENCES

Defendant Kavaja alleges that the imposition of consecutive sentences following his convictions on counts eight and nine of the indictment was improper. Count eight charged Kavaja with violating 18 U.S.C. 844(i) by attempting to place a bomb in the Yugoslav Club in Chicago, a building used in interstate commerce. Count nine charged a violation of 18 U.S.C. 844(d) for attempting to transport in interstate commerce a bomb knowing that it would be used "to kill, injure and intimidate individuals and destroy a building known as the Yugoslav Club." Kavaja alleges first that

3/ Defendant Kajevic also objects to the informant's mention of an automatic weapon owned by Kajevic. Again we find no reversible error in the context of this trial.

Congress did not intend to subject defendants to multiple punishments for violations of these two paragraphs and second, that if Congress did so intend, cumulative punishment such as that imposed here violates the double jeopardy clause of the Fifth Amendment. We find neither argument persuasive.

Section 844 was enacted as a part of the Organized Crime Control Act of 1970. Its inclusion in the Act was prompted largely by the campus bombings of the late 1960's, particularly the fatal bombing at the University of Wisconsin. Paragraph (d) of the section reads as follows:

> (d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

Paragraph (i) provides:

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 24 of this title.

In this case Kavaja's participation in the aborted plot to blow up the Yugoslav Club resulted in his receiving two consecutive ten year terms of imprisonment for violation of these two paragraphs.

There is no question that in enacting section 844 Congress intended to make the interstate transportation of explosives (844 (d)) and the use of explosives to damage a building used in interstate (844(i)) separate offenses separately punishable. That, however, does not necessarily mean that Congress authorized consecutive sentences where both offenses occur as part of a single

criminal episode. Whalen v. United States, U.S. , 48 U.S.L.W. 4406 (April 16, 1980). The determination of that intent requires consideration of the purpose of the legislation, its history, and the relationship of the two offenses to each other. United States v. Makres, 598 F.2d 1072, 1075 (7th Cir. 1979).

In enacting these two provisions of section 844 Congress was responding to two separate concerns. One was the danger of interstate shipment of explosives, which carries with it not only the risk that people or property will be injured by the explosives but also that state law enforcement procedures will be evaded by the interstate transportation. Paragraph (i), on the other hand, is directly addressed to the dangers created by the actual or attempted use of explosives. These separate dangers are consistent with a congressional intent in favor of separate, and cumulative, punishment. Ianelli v. United States, 420 U.S. 770, 779 (1975). The two provisions were enacted at the same time: this is not a case where a statute prohibiting theft is later amended to reach the possessors of the stolen property and is thus inappropriately enforced (absent clear congressional intent to the contrary) as an additional penalty against the original thief. See Milanovich v. United States, 365 U.S. 415 (1959). Nor is this a case in which a lesser crime "merges into" a greater crime when the greater crime is completed. Whalen v. United States, U.S. , 48 U.S.L.W. 4406, 4408-9 (April 16, 1980); Prince v. United States, 352 U.S. 322 (1957). We find no reason to believe that Congress intended to prevent cumulative punishment for violations of these two provisions.

The double jeopardy question is tested by the rule laid out in Blockburger v. United States.

> "The applicable rule is where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. 299, 304 (1932). See also Brown v. Ohio, 432 U.S. 161 (1977). There is no question that although there was certainly some overlap of proof counts eight and nine of the indictment required the government to prove different facts in support of each and the government did so prove. There is no constitutional infirmity in the consecutive sentences received by Kavaja.

OTHER ISSUES

We have considered the other issues raised by the defendants, in addition to the ones discussed above, and find none of them to be with merit.

DISPOSITION OF OTHER PENDING MOTIONS

On may 23, 1980 Defendant Kavaja filed a "Motion to Supplement Record" which sought to supplement the record of this case on appeal with a copy of certain FBI documents. The government filed a "Response to Defendant-Appellant Kavaja's Motion to Supplement the Record" on May 30. On June 18, 1980 Kavaja filed a "Motion for Leave to Correct Kavaja's Motion to Supplement the Record" and a "Motion for Leave to File Reply in Further Support of Motion to Supplement the Record." On consideration of these documents IT IS ORDERED:

First, that the "Motion for Leave to Correct Kavaja's Motion to Supplement the Record" is GRANTED;

Second, that the "Motion for Leave to File Reply in Further Support of Motion to Supplement the Record" is GRANTED;

Third, that the "Motion to Supplement the Record" is DENIED.

On July 7, 1980 Kavaja filed a "Motion for Summary Reversal" alleging that he was denied his Sixth Amendment right to effective assistance of counsel because he did not speak English and was not provided with simultaneous translation of the trial testimony. We note from our own review of the record below that both the tape recordings and the testimony of the key government witnesses were in Serbian and, in addition, that Kavaja's trial counsel was fluent in both English and Serbian. Motion for Summary Reveresal is DENIED.

CONCLUSION

The various motions filed by Defendant Kavaja are disposed of as set forth above. The judgments of conviction are AFFIRMED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

DECEMBER 23, 19 80.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. PHILIP NICHOLS, JR., Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No.s. 79-1686, 79-1700vs.
79-1707, 79-1737

STOJILKO KAJEVIC, NIKOLA KAVAJA, RADOS STEVLIC, and NIKOLA ZIVOVIC,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 78-CR-858
HUBERT L. WILL, Judge.

O R D E R

On consideration of the petitions for rehearing and suggestions for rehearing in banc filed in the above-entitled cause by counsel for defendants-appellants, no judge in regular active service has requested a vote on the suggestions for rehearing in banc, and all members of the original panel have voted to DENY a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing filed November 3, 1980 by Appellant Kavaja; filed November 4, 1980 by Appellants Stevlic and Zivovic, and filed November 18, 1980 by Appellant Kajevic be, and the same are each hereby, DENIED.

*The Honorable Philip Nichols, Jr., Judge of the United States Court of Claims, is sitting by designation.

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